IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Daniel Bill, Bryan Hanania, and Michael Malpass, Plaintiffs, v. Warren Brewer, Heather Polombo, John Does I-V, and Jane Does I-V, Defendants.	No. CV-12-02613-PHX-SRB **ORDER**

At issue is Defendants Warren Brewer and Heather Polombo's Motion to Dismiss ("MTD") (Doc. 12). The Court held oral argument on Defendants' Motion on March 18, 2013. (*See* Doc. 25, Min. Entry.)

I. BACKGROUND

Pursuant to 42 U.S.C. § 1983, Plaintiffs Daniel Bill, Bryan Hanania, and Michael Malpass have brought suit against Defendants for violation of their Fourth and Fourteenth Amendment rights under the United States Constitution and are seeking declaratory and injunctive relief, as well as nominal damages. (Doc. 1, Compl. at 1.) Plaintiffs are all police officers in the City of Phoenix Police Department ("PPD") who were among over 300 persons who converged on the area where Sergeant Sean Drenth was found dead on October 18, 2010. (*Id.* ¶¶ 3-5, 9, 11-15.) Plaintiffs Bill and Hanania were never closer than fifteen feet from Sergeant Drenth's body and the weapons found nearby, and Plaintiff Malpass was never closer than thirty feet from the weapons found with Sergeant

Drenth's body. (*Id.* ¶¶ 10, 17-18.) Plaintiffs never touched or entered Sergeant Drenth's patrol car. (*Id.* ¶¶ 17-18.) Reports detailing Plaintiffs' actions and locations were available to PPD detectives Defendants Brewer and Polombo at all relevant times. (*Id.* ¶¶ 6-7, 21-24.)

During the course of the PPD's homicide investigation into the death of Sergeant Drenth, a full unknown male DNA profile was found on Sergeant Drenth's patrol vehicle, and a partial unknown male DNA profile was found on Sergeant Drenth's weapons. (*Id.* ¶¶ 25-26.) Beginning on December 27, 2010, and continuing over the next several months, Defendant Polombo communicated with Plaintiffs and other members of their search teams about obtaining DNA samples for what Defendant Polombo said were exclusionary purposes. (*Id.* ¶ 29.) Plaintiffs "agreed in principle to provide the samples on the condition that they receive satisfactory assurances about the use and disposition of the samples and any subsequent analysis of the samples." (*Id.*) During their communications Plaintiffs informed Defendant Polombo of their specific locations and activities on October 18, 2010, so he "knew or had substantial reason to know" that they could not have been the source of any DNA found on Sergeant Drenth's patrol vehicle and weapons. (*Id.* ¶ 30.) Plaintiffs allege on information and belief that Defendant Polombo shared this information with Defendant Brewer and others. (*Id.*)

On April 18, 2011, Defendant Polombo met with Plaintiffs and provided them with a memorandum entitled "DNA Collection Fact Sheet – Drenth Investigation," which stated that DNA samples had been recovered from the scene that had not been identified, that "DNA samples from all known people in the scene [we]re needed to eliminate them as contributors," that recipients of the memorandum were being requested to provide samples of DNA based on information indicating they were in the scene, that DNA samples would be obtained by buccal swabs and retained by a laboratory in accordance with Arizona Revised Statutes ("A.R.S.") § 13-4221, and that the results of the DNA testing would be documented in a report and would be discoverable in accordance with Arizona law. (*Id.* ¶ 33.) During the April 18, 2011, meeting, Defendant Polombo told

1 Plaintiffs that she knew they "were not involved in Sergeant Drenth's death because the
2 locators in their portable radios and the mobile digital communicators in their vehicles
3 confirmed their locations on the night of October 18, 2010." (*Id.* ¶ 35.)
4 After this meeting Plaintiffs retained counsel in an attempt to negotiate a
5 compromise with the PPD, and while these negotiations were continuing, Defendants
6 Brewer and Polombo were instructed to apply to the Maricopa County Superior Court for
7 detention orders pursuant to A.R.S. § 13-3905, authorizing the temporary detention of
8 Plaintiffs for purposes of taking samples of their DNA. (*Id.* ¶¶ 36-37.) On August 8,
9 2011, Defendant Brewer applied to the Maricopa County Superior Court for detention
10 orders for Plaintiffs, and in support of these applications he executed affidavits stating
11 that there was probable cause to believe that the felony of homicide was committed by an
12 unknown suspect on October 18, 2010, that the procurement of a saliva sample by mouth
13 swab from Plaintiffs "may contribute to the identification of the individual who
14 committed the felony offense," and that such evidence could not be obtained from the
15 law enforcement agency employing him or from the criminal identification division of
16 the Arizona Department of Public Safety. (*Id.* ¶ 39.)
17 The affidavits also described the circumstances under which Sergeant Drenth's
18 body was found and explained that partial unknown male DNA was found on the
19 weapons by his body and a full unknown male profile was collected from his vehicle,
20 indicating that this was a homicide. (*Id.*) The affidavits stated that investigators believed
21 two possible scenarios could have taken place: that the scene was a homicide staged to
22 look like a suicide or a suicide staged to look like a homicide. (*Id.*) The affidavits also
23 stated that on October 18, 2010, approximately 300 PPD officers responded to the call
24 regarding an injured officer and that approximately 50 PPD officers "entered the scene
25 where Sergeant Drenth was found." (*Id.*) The affidavits affirmed that investigators had
26 collected buccal swabs from all but five of the PPD personnel that were inside the scene
27 and stated that "[a]ll five officers had the potential to inadvertently deposit their DNA on
28 the collected evidence." (*Id.*) The affidavits listed Plaintiffs as three of these five officers

and requested that the court issue an order to allow investigators to obtain a saliva sample from Plaintiffs "to be analyzed for DNA and compared to other evidence in this investigation." (*Id.*)

Plaintiffs allege that Defendant Polombo assisted in the preparation of the applications for the detention orders, including the affidavits, and that at the time that Defendants Brewer and Polombo prepared and submitted the affidavits, they knew or had substantial reason to know that the following statements contained in the affidavits were false: (1) that the procurement of a saliva sample from Plaintiffs "may contribute to the identification of the individual who committed the felony," (2) that approximately fifty PPD officers entered the scene where Sergeant Drenth was found, and (3) that "[a]ll five officers had the potential to inadvertently deposit their DNA on the collected evidence." (*Id.* ¶¶ 40, 42.) Plaintiffs allege that the applications and affidavits "were completely devoid of any fact establishing individualized suspicion that Plaintiffs . . . had committed criminal wrongdoing or were otherwise responsible for the death of Sergeant Drenth" and that Defendants Brewer and Polombo omitted facts well known to them establishing the locations and activities of Plaintiffs "on the night of October 18, 2010, including the fact that none of the officers were in sufficient proximity to Sergeant Drenth's body or his patrol vehicle or weapons to have deposited their DNA either on the vehicle or on any of the weapons." (*Id.* ¶¶ 41, 43.)

On August 8, 2011, the Honorable Douglas L. Rayes of the Maricopa County Superior Court issued the detention orders requested, finding that there was probable cause to believe that a homicide had been committed, that the procurement of a saliva sample from Plaintiffs "may contribute to the identification of the individual who committed the offense," and that Detective Brewer could not obtain such evidence from the PPD or the criminal identification division of the Arizona Department of Public Safety. (*Id.* ¶ 44.) Judge Rayes ordered that a saliva sample by mouth swab be obtained from Plaintiffs and that this evidence "be used in the identification or exclusion of [Plaintiffs] . . . as the perpetrator of the offense." (*Id.*) On August 15 and 17, 2011,

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Defendants Brewer and Polombo served Plaintiffs with the detention orders and obtained buccal swabs from them, which were subsequently provided to the PPD's Laboratory Services Bureau for processing and analysis; at no point did Plaintiffs "consent to the taking and subsequent processing and analysis of their DNA." (*Id.* ¶¶ 45-47, 49.)

On at least two occasions the PPD denied that the detention orders served on Plaintiffs were search warrants or that Plaintiffs were suspects in Sergeant Drenth's death. (*Id.* ¶ 51.) The PPD specifically stated on August 21, 2011, that "[t]hese are not search warrants and do not require the same level of cause," and on August 22, 2011, the PPD issued a notice again denying that the court orders were search warrants and stating that "[t]hese court orders are based on reasonable cause." (*Id.* ¶¶ 52-53.) The PPD explained, "Members of some media and other outlets may make claims these employees are considered suspects. This is not true. These employees were determined to be within a critical area within the scene and their DNA was collected strictly for comparative analysis." (*Id.* ¶ 53.) The PPD recognized that Plaintiffs were among certain employees who "exercised their constitutional right and refused to provide their DNA, necessitating a court order." (*Id.*)

The PPD's Laboratory Services Bureau processed the buccal swabs taken from Plaintiffs and prepared reports; Defendants Brewer and Polombo continue to maintain control over these reports as well as the impounded buccal swabs. (*Id.* ¶¶ 54-57.) The DNA samples will be retained by the PPD for as long as fifty-five years, or until 2066, pursuant to § A.R.S. 13-4221. (*Id.* ¶ 58.)

Plaintiffs allege that the act of taking a buccal swab was an unconstitutional search under the Fourth and Fourteenth Amendments of the United States Constitution, as it was done without a search warrant, without probable cause, and without having a non-law enforcement special need. (*Id.* ¶¶ 60-62.) Plaintiffs also allege that Defendants Brewer and Polombo omitted material information when seeking the orders of detention and that they continue to violate Plaintiffs' constitutional rights by retaining the samples of DNA, as well as analyses and reports of these samples, which were derived from unlawful

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searches and seizures. (*Id.* ¶¶ 63-64.) Plaintiffs seek a declaration that the searches and seizures of their DNA were unlawful; an injunction enjoining "Defendants from continuing to maintain possession, custody, or control of Plaintiffs' DNA samples"; an order that Defendants "expunge or destroy the buccal swabs . . . and any analyses and reports of Plaintiff's DNA samples"; nominal damages in the amount of one dollar each; and reasonable attorneys' fees and costs. (*Id.*, Prayer for Relief.)

II. LEGAL STANDARDS AND ANALYSIS

A. Standard of Review

The Federal Rules of Civil Procedure require "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

A Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011), *cert. denied*, *Blasquez v. Salazar*, 132 S. Ct. 1762 (2012). In determining whether an asserted claim can be sustained, "[a]ll of the facts alleged in the complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party." *Bates v. Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, "for a

complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556.

B. Analysis

Defendants argue that Plaintiffs' Complaint should be dismissed because "Plaintiffs do not state a valid claim for a constitutional violation and Defendants are entitled to qualified immunity." (MTD at 1.) Because Plaintiffs are seeking declaratory and injunctive relief in addition to nominal damages, qualified immunity would be a defense only to their claim for nominal damages. *See Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) ("'Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief.'" (quoting *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989))). The relevant question this Court must address for Plaintiffs' claims to both equitable and monetary relief is whether they have adequately stated a claim for a violation of their constitutional rights under the Fourth and Fourteenth Amendments. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (in order for the defense of qualified immunity to fail, a plaintiff must allege facts "mak[ing] out a violation of a constitutional right" and show that this right "was clearly established at the time of defendant's alleged misconduct" (quotation omitted)). Because the Court determines that Plaintiffs have not stated a claim for a constitutional violation, it need not address whether any alleged right was clearly established.

1. Plaintiffs' Claim That They Were Subjected to Unjustified Warrantless, Suspicionless Searches

Plaintiffs bring a single count pursuant to 42 U.S.C. § 1983 for a violation of their Fourth Amendment "right to be secure in their persons against unreasonable searches and seizures," (*see* Compl. ¶¶ 59-66), which is "made applicable to the States by the Due

Process Clause of the Fourteenth Amendment." *See City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2624 (2010). The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Plaintiffs do not allege that Defendants violated A.R.S. § 13-3905, nor do they allege that they were unlawfully detained or seized. (*See generally* Compl.) Rather, they allege that Defendants violated "their rights under the U.S. Constitution by subjecting them to buccal swabs for purposes of DNA analysis without obtaining search warrants, without probable cause, and without having a non-law enforcement special need." (Compl. ¶ 62; *see also* Doc. 20, Pls.' Mem. in Opp'n to MTD ("Resp.") at 3 ("Plaintiffs do not claim that they were unlawfully detained; they claim that they were unlawfully searched.").)

It is clearly established that taking a buccal swab to extract DNA "constitute[s] a search under the Fourth Amendment." *Friedman v. Boucher*, 580 F.3d 847, 852 (9th Cir. 2009); *see also Kohler v. Englade*, 470 F.3d 1104, 1109 n.4 (5th Cir. 2006) ("It is undisputed that the collection of a saliva sample for DNA analysis is a search implicating the Fourth Amendment."). It is also generally true that "[a] warrantless search is unconstitutional unless the government demonstrates that it falls within certain established and well-defined exceptions to the warrant clause." *Friedman*, 580 F.3d at 853 (internal quotation marks and citation omitted; alteration incorporated). Plaintiffs point out "'three categories of searches'" that the Ninth Circuit Court of Appeals has characterized as "'help[ing] organize the jurisprudence,'" and argue that because the searches here did not occur in an exempted area such as a border, airport, or prison; were clearly not administrative; and did not encompass a non-law enforcement special need, they are unconstitutional. (*See* Resp. at 5-7 (quoting *United States v. Kincade*, 379 F.3d 813, 822-23 (9th Cir. 2004)).) The Court agrees with Plaintiffs that the searches here do not fall within any of these particular exceptions to the warrant clause, but these

1 categories are “not necessarily mutually-exclusive,” and there are “a variety of
2 conditions” under which “law enforcement may execute a search without first complying
3 with [the] dictates [of the Warrant Clause].” *See Kincade*, 379 F.3d at 822; *see also, e.g.*,
4 *United States v. Knights*, 534 U.S. 112, 121 (2001) (“Although the Fourth Amendment
5 ordinarily requires the degree of probability embodied in the term ‘probable cause,’ a
6 lesser degree satisfies the Constitution [and the warrant requirement is rendered
7 unnecessary] when the balance of governmental and private interests makes such a
8 standard reasonable.”); *Terry v. Ohio*, 392 U.S. 1, 27-31 (1968) (holding constitutional “a
9 reasonable search for weapons for the protection of [a] police officer, where he has
10 reason to believe that he is dealing with an armed and dangerous individual, regardless of
11 whether he has probable cause to arrest the individual for a crime”).
12 Regardless of whether they fall into one of the three categories described by
13 *Kincade*, *Terry* and other cases stand for the proposition that in some cases warrantless
14 searches – even of the body – are reasonable and thus permissible. *See, e.g.*, *United States*
15 *v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976) (“The law of this circuit . . . is that there is
16 no per se requirement for a warrant to conduct a body search in border crossing cases.”);
17 *see also Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) (affirming
18 “the longstanding principle that neither a warrant nor probable cause, nor, indeed, any
19 measure of individualized suspicion, is an indispensable component of reasonableness in
20 every circumstance”). Instead of concluding that the searches here are per se
21 unconstitutional because they were executed without a search warrant and do not fall
22 within one of the three exceptions to the warrant requirement discussed in *Kincade*, the
23 Court concludes that it should apply the “totality of circumstances” test for determining
24 whether the searches here were reasonable. *See Pennsylvania v. Mimms*, 434 U.S. 106,
25 108-09 (1977) (“The touchstone of our analysis under the Fourth Amendment is always
26 ‘the reasonableness in all the circumstances of the particular governmental invasion of a
27 citizen’s personal security.’” (quoting *Terry*, 392 U.S. at 19)); Angus J. Dodson, *DNA*
28 *“Line-Ups” Based on a Reasonable Suspicion Standard*, 71 U. Colo. L. Rev. 221, 231-32

(Winter 2000) ("[A]lthough the Fourth Amendment protects people from unreasonable search and seizure, the Amendment does not per se preclude "reasonable" searches and seizures, regardless of whether they are conducted with probable cause or a search warrant."); *see also Samson v. California*, 547 U.S. 843, 847-48 (2006) (applying totality of circumstances test to determine whether a "suspicionless search" of a parolee violated the Fourth Amendment); *Knights*, 534 U.S. at 118-19, 122 (applying totality of circumstances test in finding that a warrantless search of a probationer was reasonable where it was "supported by reasonable suspicion and authorized by a condition of probation"); *Haskell v. Harris*, 669 F.3d 1049, 1053-54 (9th Cir. 2012), *reh'g en banc granted*, 669 F.3d 1049 ("We apply the 'totality of the circumstances' balancing test to determine whether a warrantless search is reasonable."); *United States v. Kriesel*, 508 F.3d 941, 942, 946-47 (9th Cir. 2007) (determining that the court should apply the totality of circumstances test in evaluating constitutionality of DNA Act requiring the DNA sample of a convicted felon on supervised release); *Kincade*, 379 F.3d at 830-32 (determining that the court should apply the totality of circumstances test to decide the constitutionality of "suspicionless searches of conditional releasees . . . conducted for law enforcement purposes"). Under this test, "[w]hether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118-19).[1]

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[1] The Court rejects Plaintiffs' argument that "'there may be a prerequisite to the application of this test: there must be some legitimate reason for the individual having less than the full rights of a citizen.'" (Resp. at 10 (quoting *United States v. Pool*, 621 F.3d 1213, 1219 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (2011)).) In the absence of any controlling authority that the Court should *not* apply what the Supreme Court has termed the "'general Fourth Amendment approach,'" the Court will apply it here. *See Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118); *see also Wyoming v. Houghton*, 526 U.S. 295, 297-300, 303-06 (1999) (in determining whether a particular governmental action violates the Fourth Amendment, courts "inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed" and where "that inquiry yields no answer, [they] must evaluate the search or seizure under traditional standards of reasonableness") (applying balancing

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Turning to the governmental interest at issue here, "[c]ertainly the interest of society in the investigation of felonies is very high," especially when the felony is homicide. *See State v. Grijalva*, 533 P.2d 533, 535-37 (Ariz. 1975) (upholding constitutionality of A.R.S. § 13-3905 and applying balancing test to conclude that the interest in felony investigation is "very high," while the "degree of intrusion into the person's privacy is relatively slight"); *see also Washington v. Glucksberg*, 521 U.S. 702, 728-729 (1997) (recognizing that state homicide laws advance states' commitment to their "unqualified interest in the preservation of human life" (quotation omitted)). Indeed, the importance of the governmental interest in solving crimes was one of the animating reasons behind the Supreme Court's dictum in *Davis v. Mississippi* that detentions for the sole purpose of obtaining fingerprints "might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *See* 394 U.S. 721, 727 (1969) (noting that "fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree'").

The Supreme Court's elaboration on why probable cause may be unnecessary in certain circumstances is relevant to the case at hand:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. . . . Finally, because there is no

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test to search of passenger's belongings in car). In addition, while the detention orders issued here were concededly not search warrants in the typical sense, they were prior judicial authorizations based on individual suspicion that Plaintiffs had evidence relevant to the crime being investigated, which the Supreme Court has suggested takes this case outside the realm of not only the special-needs and administrative-search cases, but also cases such as *City of Indianapolis v. Edmond*, where the Court suggested that the balancing approach should not be applied to suspicionless searches or seizures conducted for general law enforcement purposes. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011) ("The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well."); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 40-43, 47 (2000).

> danger of destruction of fingerprints, the limited detention need not come unexpectedly or a[t] an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

Id. at 727-728; *see also Hayes v. Florida*, 470 U.S. 811, 816-817 (1985) ("We also do not abandon the suggestion . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.").

In response to *Davis*, nine states, including Arizona, enacted procedures for judicially authorizing detentions to obtain evidence of identifying physical characteristics. *See In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239, 1245-46 & n.3 (Vt. 2000); Paul C. Giannelli & Edward L. Imwinkelried, Jr., *Scientific Evidence* § 2.04[a][2] at 112 & n.130 (4th ed. 2007) ("*Scientific Evidence*"); *see also* A.R.S. § 13-3905.[2] These statutes have generally been held constitutional by state courts, even when they allow for detentions and obtaining physical evidence on less than probable cause. *See Scientific Evidence* § 2.04[a][2] at 112-16 & nn.142-45; *see also Grijalva*, 533 P.2d at 535-36 (upholding constitutionality of Arizona statute and ruling that the issuing judge must have "reasonable cause to believe that" a "nexus . . . between the person detained and the crime being investigated . . . exists"). It was pursuant to

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[2] A.R.S. § 13-3905 provides that an officer investigating a felony "may make written application upon oath or affirmation to a magistrate for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual" and that the

> magistrate may issue the order on a showing of all of the following: 1. Reasonable cause for belief that a felony has been committed. 2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense. 3. The evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the department of public safety.

A.R.S. § 13-3905(A). Identifying physical characteristics include, but are "not limited to, the fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance or photographs of an individual." *Id.* § 13-3905(G).

Arizona's statute that Plaintiff's buccal swabs of DNA were obtained in this case. (*See* Compl. ¶¶ 37-39, 44-47.)

Despite the fact that DNA buccal swabs have been denominated searches within the meaning of the Fourth Amendment, the Court finds that they have all the characteristics of fingerprinting that the Supreme Court indicated could justify requiring less than probable cause: they "constitute a much less serious intrusion upon personal security than other types of police searches and detentions," they involve "none of the probing into an individual's private life and thoughts that marks an interrogation," they need not "be employed repeatedly," they constitute "an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions," and they need not – nor are they alleged to have – "come unexpectedly or a[t] an inconvenient time." *See Davis*, 394 U.S. at 727; *see also In re Nontestimonial Identification Order*, 762 A.2d at 1246-47 (upholding Vermont rule allowing saliva sampling for DNA based on a showing of only reasonable suspicion and concluding "that the basic elements of saliva sampling for DNA are similar to the characteristics of fingerprinting as described in *Davis*"); Dodson, *supra* at 254 ("DNA profiling is closely analogous to fingerprinting, and the Fourth Amendment supports a limited application of DNA line-ups under the Davis v. Mississippi theory."). Here, there was even "the authorization of a judicial officer . . . obtained in advance" that the Supreme Court deemed so important. *See Davis*, 394 U.S. at 728. The Court finds that the fact that a DNA buccal swab constitutes a search is not dispositive of whether it may be carried out on reasonable suspicion, as opposed to probable cause, pursuant to a *Davis*-contemplated procedure. *See Terry*, 392 U.S. at 27 (articulating reasonable suspicion standard (though not using those words) in a search case); *cf. Kincade*, 379 F.3d at 821 n.15 ("[T]he fact that [a DNA] extraction constitutes a search is hardly dispositive [of its constitutionality], as 'the Fourth Amendment does not proscribe all searches and seizures . . . .'" (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989))).

Indeed, "the Fourth Amendment's proper function is to constrain, not against all

1 [compelled intrusions into the body] as such, but against intrusions which are not justified
2 in the circumstances, or which are made in an improper manner." *Schmerber v.*
3 *California*, 384 U.S. 757, 768 (1966). The Court has already found that the PPD's
4 interest in investigating a homicide was great. In considering Plaintiffs' privacy interests,
5 this Court joins with other courts and commentators in finding that the intrusion upon
6 Plaintiffs' privacy and bodily integrity caused by the buccal swabs – the searches at issue
7 here – was minimal. *See, e.g.*, *Haskell*, 669 F.3d at 1059 ("The buccal swab cannot
8 seriously be viewed as an unacceptable violation of a person's bodily integrity."); *United*
9 *States v. Amerson*, 483 F.3d 73, 84 n.11 (2d Cir. 2007) (finding that intrusion occasioned
10 by taking DNA by blood sample was minimal and noting that "[i]f instead, the DNA
11 were to be collected by cheek swab, there would be a lesser invasion of privacy because a
12 cheek swab can be taken in seconds without any discomfort"); *In re Nontestimonial*
13 *Identification Order*, 762 A.2d at 1247 ("[W]e do not believe a saliva procedure involves
14 a 'serious intrusion upon personal security.'" (quoting *Davis*, 394 U.S. at 727)); Jules
15 Epstein, *"Genetic Surveillance" – The Bogeyman Response to Familial DNA*
16 *Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (Spring 2009) ("The taking of
17 bodily material for DNA testing is perhaps the least intrusive of all seizures--it involves
18 no penetration of the skin, pain, or substantial inconvenience."); *cf. Skinner*, 489 U.S. at
19 625 ("[B]lood tests do not constitute an unduly extensive imposition on an individual's
20 privacy and bodily integrity." (quotation omitted)).

21 While the Ninth Circuit Court of Appeals has noted in "assessing the nature of the
22 privacy intrusion . . . that DNA often reveals more than identity," it has also found that
23 such concerns "are mitigated by . . . privacy protections." *See Kriesel*, 508 F.3d at 947-48
24 (noting DNA Act's "criminal penalties for the unauthorized use of DNA samples"). Here,
25 Plaintiffs quoted extensively from a Fact Sheet they were given by Defendant Polombo,
26 and thus the Court may consider this document as incorporated by reference in Plaintiffs'
27 Complaint. (*See* Compl. ¶ 33); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th
28 Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by

reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."). The fact sheet attached to Defendants' Motion reveals that Defendants told Plaintiffs—and Plaintiffs do not allege that any of these statements are false—that their DNA samples would "be used for comparison to evidence in this report only," would "not be entered into CODIS," would "not be entered into the employee database" without Plaintiffs' permission, and would "not be used for any research type testing, including race, ethnicity or health nor will the sample[s] be provided to any outside organization for those purposes." (MTD, App'x A, Fact Sheet.) In light of these protections, the Court finds that any "concerns about DNA samples being used beyond identification purposes . . . are mitigated," *see Kriesel*, 508 F.3d at 948, and that, on balance, the invasion on Plaintiffs' privacy interests was slight in comparison to the important governmental interest of investigating homicides.

Finally, the Court considers Plaintiffs' argument that "conducting warrantless, suspicionless, 'exclusionary' searches of persons, including police officers, as part of an ongoing criminal investigation, can never be reasonable under the Fourth Amendment." (Resp. at 11.) While it is undisputed that Plaintiffs were *not* suspects in Sergeant Drenth's death, this does not mean that the searches of Plaintiffs' DNA were "suspicionless" in the traditional sense. Rather, as A.R.S. § 13-3905 and Arizona courts make clear, there must be "[r]easonable cause for belief that a felony has been committed"[3] and "reasonable cause to believe that" a connection exists "between the person detained and the crime being investigated," which is a form of individualized suspicion. *See* A.R.S. § 13-3905(A)(1); *Grijalva*, 533 P.2d at 536; *see also State v. Via*, 704 P.2d 238, 243-44 (Ariz. 1985); *State v. Wedding*, 831 P.2d 398, 402 (Ariz. Ct. App. 1992) ("In *Grijalva*, the Arizona Supreme Court held that under the statute, probable cause to believe that the suspect committed the crime is not a necessary requirement for the temporary detention of a person to obtain evidence of physical characteristics."); *see also al-Kidd*, 131 S. Ct.

[3] Here, Judge Rayes found that there was probable cause to believe that a homicide had been committed. (Compl. ¶ 44.)

at 2082 & n.2 (rejecting the dissent's suggestion that individualized suspicion necessarily means that the person is suspected of wrongdoing and noting that it is common to make statements "such as 'I have a suspicion he knows something about the crime'"). Here, based on the facts alleged by Plaintiffs, the Court concludes that there was reasonable cause to believe that there was a nexus between Plaintiffs and the crime being investigated – namely, that Plaintiffs responded to the "officer down" broadcast and were present at the crime scene. (*See* Compl. ¶¶ 12-15.) Plaintiffs were not random persons pulled off the street with no connection whatsoever to Sergeant Drenth's death; rather, while alleging they were never closer than fifteen feet from Sergeant Drenth's body and weapons, they admit that they were at the crime scene, which is sufficient to establish the requisite nexus between them and the crime being investigated and to allow Defendants to infer that their DNA could have been present. (*See id.* ¶¶ 14-15, 17-18); *cf. Via*, 704 P.2d at 244 (determining that requisite nexus existed between defendant and crime of forgery where "police reasonably inferred that" the victim's encounters with the defendant and another individual's reportedly suspicious encounters with defendant were part of a common scheme).

Furthermore, the Court is not convinced that under either the Arizona statute or the Fourth Amendment of the United States Constitution, Plaintiffs had to be suspected of committing the crime in order to be searched. *See* A.R.S. 13-3905(A)(2) (magistrate may issue order upon showing that "[p]rocurement of evidence of identifying physical characteristics from an identified or particularly described individual *may contribute* to the identification of the individual who committed such offense") (emphasis added); *cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."); Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 5.4(d) n.131 (5th ed. 2012) ("[P]robable cause to search has to do only with the probability of finding evidence at the place searched, and .

. . there is no need to show probable cause as to the person connected with that place."). Indeed, the Supreme Court has found that "the State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not." *Zurcher*, 436 U.S. at 555. While *Zurcher* admittedly did not deal with the search of a person, but rather of a person's premises, the Court finds that its reasoning is applicable here: "whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same" and "the seeming innocence of" Plaintiffs does not "foreclose the [right] to search." *See id*. at 560.

Plaintiffs undisputedly did not engage in any wrongdoing through which they sacrificed their right to privacy. Nevertheless, given that there was probable cause for belief that a homicide had been committed, the PPD's great interest in investigating the homicide, reasonable cause for belief that there was a nexus between Plaintiffs and the crime, a prior judicial determination that procuring Plaintiffs' DNA "may contribute to the identification of the individual who committed such offense," (Compl. ¶ 44), and the minimal intrusion upon Plaintiffs' privacy and bodily integrity, the Court finds that Plaintiffs have not stated a claim for a violation of their constitutional right to be free from *unreasonable* searches. *See Skinner*, 489 U.S. at 619 ("[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); *Schmerber*, 384 U.S. at 768 ("[T]he Fourth Amendment's proper function is to constrain, not against all [bodily] intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.").[4]

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[4] Other courts, commentators, and lawmakers considering the issue have reached similar conclusions that DNA or other bodily samples can be obtained for exclusionary purposes in some circumstances without violating the Fourth Amendment. *See, e.g.*, Ind. Code § 35-38-7-15(b) (providing that court may require DNA elimination samples from a third party where the petitioner has been excluded as the perpetrator or accomplice by DNA testing or where "extraordinary circumstances are shown"); *Commonwealth v. Draheim*, 849 N.E.2d 823, 829 (Mass. 2006) ("[W]here the third parties are not suspects, in order to respect the third parties' constitutional rights, the Commonwealth must show probable cause to believe *a* crime was committed, and that the [saliva] sample will probably provide evidence relevant to the question of the defendant's guilt."); *Matter of Morgenthau*, 457 A.2d 472, 473, 475-76 (N.J. Super. Ct. App. Div. 1983) (holding that an order compelling hair and blood samples and finger and palm prints "is not to be denied on the basis that it was directed to a nonculpable third party" and finding that the

2. Plaintiffs' Claim That Defendants Omitted Material Information When They Sought the Orders of Detention

Plaintiffs argue in the alternative that "if the Court were to determine that the orders of detention permitted Defendants to obtain samples of Plaintiffs' DNA, then Defendants' subsequent searches of Plaintiffs' DNA were nonetheless unlawful under the Fourth Amendment because the affidavits submitted by Defendants in obtaining the orders omitted material information." (Resp. at 14.) Specifically, Plaintiffs allege that Defendants Brewer and Polombo omitted from the applications and affidavits facts well known to them "establishing the locations and activities of Plaintiffs . . . on the night of October 18, 2010, including the fact that none of the officers were in sufficient proximity to Sergeant Drenth's body or his patrol vehicle or weapons to have deposited their DNA either on the vehicle or on any of the weapons." (Compl. ¶ 43; *see also* Resp. at 14.)

Ordinarily, for a claim of an invalid search warrant, the plaintiff must adequately allege (1) "that the warrant affidavit contained misrepresentations or omissions material to the finding of probable cause, and (2) . . . that the misrepresentations or omissions were made intentionally or with reckless disregard for the truth." *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011); *see also United States v. Rettig*, 589 F.2d 418, 422 (9th Cir. 1978). In reviewing the sufficiency of an affidavit, a "magistrate's determination of probable cause should be paid great deference," and "courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a

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trial judge "balanced the privacy interest of the appellants and the effect of the minimal invasion of that privacy against the societal interest of an adequate prosecution for multiple serious criminal acts" and correctly concluded "that the societal interest should prevail"); Paul C. Giannelli, *ABA Standards on DNA Evidence*, 24-SPG Crim. Just. 24, 30 (Spring 2009) (explaining that the ABA Standards on DNA Evidence permit "collecting biological samples from nonsuspects" and "would permit the issuance of a court order to a nonsuspect if there is probable cause to believe that a serious crime has been committed, and 'a sample is necessary to establish or eliminate that person as a contributor to or source of the DNA evidence or otherwise establishes the profile of a person who may have committed the crime'" (citation omitted)); *see also Zurcher*, 436 U.S. at 556-57 & n.6, 559 (finding support in an American Law Institute Model Code and commentators on the Fourth Amendment for its holding that the "critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property").

commonsense, manner." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (internal quotation marks and citations omitted; alterations incorporated). "The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987).

The Court agrees with Defendants that "Plaintiffs incorrectly contend as 'fact' the allegation that 'Plaintiffs were never in sufficient proximity to Sgt. Drenth's patrol vehicle or weapons to have deposited their DNA on either the vehicle or the weapons.'" (Doc. 22, Defs.' Reply on MTD ("Reply") at 9 (quoting Resp. at 14).) Plaintiffs allege that it was a false statement in the affidavits that they "'had the potential to inadvertently deposit their DNA on the collected evidence,'" but they also allege that "over 300 . . . persons . . . converged on the area where Sergeant Drenth's body had been found" and that they were among those who went to the scene. (*See* Compl. ¶¶ 11, 14-15, 42.) The Court finds that it was reasonable for Judge Rayes to determine based on these facts that Plaintiffs' DNA could have contaminated the crime scene and that saliva samples from them could "contribute to the identification of the individual who committed the offense" by helping establish whether the unknown DNA profiles on Sergeant Drenth's weapons and patrol car were from a potential killer or from crime scene contamination. (*See id.* ¶ 44.) While Plaintiffs allege that Plaintiff Malpass was never closer than thirty feet from the weapons found with Sergeant Drenth's body and that he never touched or entered Sergeant Drenth's patrol car, and likewise that Plaintiffs Bill and Hanania were never closer than fifteen feet from Sergeant Drenth's body or weapons and never touched or entered his patrol car, the Court finds that any omission of these facts was not material to Judge Rayes' determination that the taking of Plaintiffs' DNA was warranted. (*See id.* ¶¶ 17-18). Notably, Plaintiffs do not allege that the affidavits falsely represented that Plaintiffs were suspects; rather, the affidavits clearly stated that Plaintiffs "were asked to voluntarily provide buccal swabs for elimination purposes" and that the PPD wanted to compare Plaintiffs' DNA "to other evidence in this investigation." (*See id.* ¶ 39.) To require Defendants to have included the exact whereabouts of Plaintiffs and the fact that

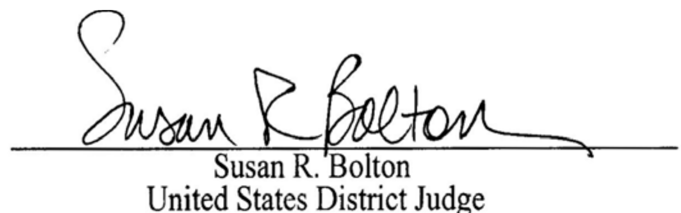
they were never within fifteen or thirty feet of Sergeant Drenth's body or weapons would be to impose a "hypertechnical" requirement that the Court is confident was *not* material to Judge Rayes' determination that obtaining Plaintiffs' DNA could contribute to the identity of the killer. *See Gates*, 462 U.S. at 236 (quotation omitted); *see also United States v. Ventresca*, 380 U.S. 102, 108 (1965) ("[A]ffidavits for search warrants . . . must be tested and interpreted by . . . courts in a commonsense and realistic fashion. . . . Technical requirements of elaborate specificity . . . have no proper place in this area."). The Court finds that any omission from Defendant Brewer's affidavits was not material and that Plaintiffs have failed to state a claim upon which relief can be granted.

III. CONCLUSION

Taking all of Plaintiffs' allegations as true, the Court finds that there was nothing unreasonable about Defendants' search of Plaintiffs' DNA or the manner in which it was conducted, nor did Defendants omit any material information from their affidavits. The Court accordingly grants Defendants' Motion to Dismiss Plaintiffs' Complaint.

IT IS ORDERED granting Defendants' Motion to Dismiss (Doc. 12) and instructing the Clerk to enter judgment in favor of Defendants.

Dated this 16th day of April, 2013.



Susan R. Bolton
United States District Judge